No. 9055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

City and County of San Francisco (a municipal corporation),
Appellant.

vs.

United States of America,
Appellee.

REPLY BRIEF FOR APPELLANT.

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vs.	
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REPLY BRIEF FOR APPELLANT.

General comments on appellee's brief.

The brief for the Government in this case is a reflection of the attitude which it has assumed from the inception of this proceeding. It argues for a strained construction of the Raker Act, not designed to meet any proven theories of Congress with respect to the utilization of the public domain, or any theories of those charged with the administration of the Act prior to the ascendency to authority of the present Secretary of the Interior. Secretary Ickes' views as to the desirability of public as against private ownership of power distribution system are translated back twenty-five years, and are asserted to have been the views of Congress at the time the Raker Act was enacted. The only support claimed for the assertion, outside of the language of the Act, itself, is a single statement

made by Senator Norris in a debate on the bill, which happens to be in accord with the views of the present Secretary.

A strenuous attempt is made to shift, from the plaintiff to the defendant, the burden of proving whether or not the contract between the City and Pacific Gas and Electric Company is violative of Section 6 of the Raker Act. The Court is asked to disregard the express language of the contract to the effect that it is designed as an *agency* agreement. It is asked to apply to the various provisions of the contract every intendment against an otherwise permissible interpretation which would support the expressed intention. Where there is a clause that might with equal justification be included in either an agency or a sales contract, the Court is asked to construe that clause as *proof* of a *sale* rather than an *agency.* The factual basis for the recitals in the contract is ignored, as well as the assignments of error made by appellant which are predicated on the refusal of the trial court to admit testimony showing this factual basis.

And finally, still insistent upon the contention that the Raker Act is a *statute* as well as a *grant,* appellee refuses even to answer the powerful argument advanced by the City, based on uncontradicted facts, which show that the equities of the case are all against the form of remedy awarded by the trial court. In order completely to shut the door upon *any* form of *agency* agreement, which obviously, is the only means, that for many years can furnish a workable method of distributing Hetch Hetchy electric energy in San Francisco (even if the City should forthwith commence construction of or eminent domain

proceedings to acquire a publicly owned system), the Government contends,—*first,* that the language of Section 6 of the Raker Act should be strained beyond its recognized prohibitions of *sale for resale,* or *letting for subletting* purposes to include a prohibition of "allowing" or "permitting" an agent, during this interim period, to sell the energy *for the account of the City,* and, *second,* that, if the Court disagrees with this strained interpretation of the language of Section 6, but believes that the existing contract is not purely an *agency* contract (although with modification it could be made one), still the Court, regardless of equitable considerations, should refuse either to suggest what modifications should be made, or permit them to be made, and, thereby, enable the City to escape the ruinous consequences of the decree herein.

No proof of the intent of Congress

We are and always have been unable to account for the Government's attitude, as stated above. The facts before Congress at the time when the Raker Act was passed, of course, showed that the City had no distribution system then.

The Government has wholly failed to show any representations by the City to Congress that it would acquire a publicly owned distribution system. The Government has wholly failed to prove that Pacific Gas and Electric Company makes any unreasonable profit from the distribution of Hetch Hetchy energy under the contract;* that its rates are any higher than the City itself

*Indeed the Government concedes (Appellee's Br. p. 13) that the Company receives "a reasonable return for the use of [its] property".

would charge its consumers if it were distributing this energy, or that the arrangement between it and the City permits it (a privately owned company) to make a profit out of publicly owned lands—contrary to the alleged intent of Congress.

It must have been obvious, at the time the Raker Act was passed, that the City could not construct the enormously expensive works required to utilize the waters of the Tuolumne river for water supply and electric energy, without letting contracts for construction work which would normally involve a *profit* to the contractor, and that the City could not acquire the vast quantities of material needed for the construction of this project without paying a *profit* to the sellers of the material. Pending the time when the City can and does acquire its own distribution system, we are unable to see any more vice in allowing a privately owned utility a reasonable return on its capital necessary for use, and actually used in the *distribution* of this energy, than in allowing another privately owned corporation a reasonable profit for building that system. Both profits must come, sooner or later, out of the pockets of the users of the electric energy, developed and transmitted through the construction and agency contracts.

If the Government had proven or made any attempt to prove that Pacific Gas and Electric Company was being paid an unreasonable profit for the use of its capital facilities, or that the electric rate payers of San Francisco were being charged unreasonable rates for Hetch Hetchy energy, perhaps some support would be lent to the Gov-

ernment's contention; but there is no such proof or offer of proof in this case.

The Government has adduced no evidence to show that the people of San Francisco are paying any higher rates for Hetch Hetchy water or Hetch Hetchy energy than if every item of operation were being performed by the City directly. So far as any proof in this case goes, even Senator Norris' interpretation of the Raker Act as quoted on pages 62 and 63 of appellee's brief is being complied with. There is no proof that the people of San Francisco are not getting cheap power. No private corporation is retaining or using the energy. *It goes directly to the consumer from the City's power house and transmission system through the Company's distribution lines.* The City is in competition with the power company in the generation of the energy and even in its distribution, because, to the extent that the City's energy displaces the Company's energy, it prevents the Company from distributing to San Francisco consumers the Company's *own* energy generated in its own power houses. It is a fair presumption that the Company would make more profit out of its own energy. The Government has offered no proof that the net realization of the City under the agency contract gives it less than a fair and even liberal profit on its relative investment. The City's profit is a public profit.

The Government, in this proceeding, has ignored the public policy of the United States in all of its Western Federal power projects. *Under all of them, private companies have been used as the media for distribution of*

publicly generated power to the ultimate consumers. In fact, there is not only no proof, but there is nothing in recent history of which the Court could take judicial knowledge to show that the City has contravened any *general* policy of Congress with respect to the utilization of public lands. On the contrary, the proof is all the other way. But, by a strained construction of the provisions of Section 6 of the Raker Act, by ignoring the actual language of that section, by ignoring, also, the beneficial intent of the Raker Act as a whole, and by ignoring, as well, the mandates of the Act, as set forth in Section 9 thereof (*which require the City to generate and sell energy*), the Government arrives at the conclusion that the present contract has not conformed, and that no permissible modification of it could make it conform to the *specific* Congressional intent, which is claimed to underlie the Raker Act. This *alleged* intent as already pointed out, is contrary to the *general* policy of Congress as exemplified in *all* Federal power projects.

Trial court's findings Nos. X and XI are conclusions.

The Government makes the astonishing contention, on pages 23 and 60 of its brief, that the interpretation of this contract amounts to a finding of fact by the trial court, amply sustained by evidentiary findings and by the evidence. This is followed by the contention that findings of fact so sustained should not be disturbed on appeal. In the findings of fact prepared by the Government there was inserted, over the City's objection and exception (Exception and Assignment No. 60), a conclusion of law by the trial judge that the contract of July 1, 1925,

is a contract of *sale for resale* purposes. (Findings Nos. X and XI.) This finding, the Government says, is conclusive on appeal if supported by evidence, and the evidence is the language of the contract itself.

In support of this contention the Government cites some authorities (Appellee's Br. p. 61):

The first of these cases is

> *Detroit Graphite Co. v. Hoover,* 41 F. (2d) 490, 493 (C. C. A. 1, 1930).

In this case a jury was permitted to decide whether certain correspondence between the parties was tantamount to a termination of a contract. The contract itself was not construed by the jury at all. The Appellate Court held it to be a question of fact as to whether the contract was terminated or not by this correspondence.

In

> *Hoffman v. American Mills Co.,* 288 Fed. 768 (C. C. A. 2, 1923),

the Court said at page 772:

> "It is settled that the construction of written contracts, whether embodied in a single instrument or in written correspondence, is a question of law for the court and not one of fact for the jury. * * * Where the entire contract is found in the correspondence between the parties, the trial judge must construe the same; but if it is partly written and partly parol, the question of *terms* is for the jury."

The case involved a finding whether plaintiff had merely exhibited a sample of twine or orally stated its dimensions and made a warranty with respect to the same, and whether the twine when delivered complied

with the warranty. We can find no principle in this case applicable to the situation at bar.

Swiss Bankverein v. Zimmerman, 240 Fed. 87 (C. C. A. 2, 1917).

In this case the jury was allowed to find the intent of the parties in directing a re-presentation of certain bank drafts. No contract at all was involved.

M'Namee v. Hunt, 87 Fed. 298 (C. C. A. 4, 1898).

This case involved an owner's liability for tort committed by the building contractor in blasting. Identically the same principles of law were announced by the Court as in *Hoffman v. American Mills Co., supra*.

Williston on Contracts, Section 616, holds that in an ambiguous contract where words have a special local meaning a jury may properly interpret them in view of the surrounding circumstances; but if the meaning of the writing is to be decided from the contract itself without any localized meaning to its language, and from the surrounding circumstances, the question is one of law for the Court.

We are unable to find that the Government's authorities (and these are all they have cited) in any degree sustain their contention that the trial Court's finding that the City's disposal of electric energy under the contract in question here was a sale and not an agency consignment, is conclusive on this appeal.

We submit, on the other hand, that no such weight is to be given to findings of this type, nor indeed to any of the other findings of the trial judge which amount to conclusions of law in an interpretation of the contract.

At the outset, we point out that in an equity case (such as this is), this Court hears and determines the case *de novo,* and is not *concluded* by *any* finding of the trial court, however much it may defer to the latter in respect of matters which are strictly *findings of fact* and have *substantial* evidence to support them.

Waterloo Mining Co. v. Doe (C. C. A. 9), 82 Fed. 45;

Presidio Mining Co. v. Overton (C. C. A. 9), 270 Fed. 388, 390;

Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co. (C. C. A. 6), 188 Fed. 164, 168;

Erhard v. Boone State Bank (C. C. A. 8), 65 Fed. (2d) 48, 50;

O'Brien's Manual of Federal Appellate Procedure, p. 57.

Apart from the rule that a Federal Appellate Court is not *concluded* by the findings of a trial court, *in an equity case,* it is clear that a so-called "finding" by a trial court with respect to the meaning and legal effect of a written instrument is not a *finding of fact* at all, but is a *conclusion of law,* inasmuch as questions respecting the construction and meaning of a written instrument are questions of law, and are *not* questions of *fact.*

In *Coles v. Somerville,* 47 Nev. 306, 220 Pac. 550 (1923), the first paragraph of the syllabus states the rule as follows:

> "Where a contract is in writing, the determination of the legal effect of the writing or the facts in creating an agency or sale is for the court."

At page 551, foot, it was said:

> "The question for decision is: Is the agreement a contract of sale, or is it a contract of agency? **It is well settled that, where the contract is in writing, the determination of the legal effect of the writing, or the facts in creating agency or sale is a matter for the court.* Mechem on Agency (2d Ed.), § 50."

In 1 *Mechem on Sales*, § 50, it is said (p. 62):

> "Where the contract is in writing or the facts are not disputed, the question whether the writing produced or the facts admitted operate to create a sale or an agency to sell is one of law to be decided by the court;"

In *Graham, et al. v. Sadlier*, 165 Ill. 95, 46 N. E. 221, the Court said (p. 222):

> "'*What a contract means is a question of law. It is the court, therefore, that determines the construction of a contract * * * They [the court] give to the jury, as a matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take.*'"

See, also:

Equitable Life Assur. Soc. of the United States v. Wells, 101 Fed. (2d) 608;

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, 291, 66 L. Ed. 943, 946;

Brown Lumber Co. v. L. & N. R. Co., 299 U. S. 393, 397, 81 L. Ed. 301, 304.

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*Italics used in this brief have been supplied by writers unless otherwise noted.

Cases might be multiplied indefinitely upon this proposition, but it is so well known that we almost feel like apologizing for citing the few which we have cited.

The trial judge filed a written opinion wherein (after setting forth the [claimed] criteria of agency and the application of the same to the contract in evidence, all of which are fully discussed in appellant's opening brief, at pages 29 to 57) he stated (Rec. p. 125):

> "This opinion may stand in lieu of the written findings of fact and conclusions of law."

It was because of this statement in the trial court's opinion that the appellant reserved exceptions to certain matters in the opinion, and made the same the basis of assignments of error herein. It did so lest said matters might be claimed by the appellee to be findings of fact in respect of which the appellant was concluded, because it had failed to note an exception thereto or to assign the same as error. The Government in its brief (footnote p. 50) makes the claim that neither an exception nor an assignment of error can be based upon the Court's *opinion*. To this we agree, if the opinion be regarded simply as an opinion and not, as the Court, here, intended it to be, a combination of opinion and findings of fact and conclusions of law. If the purported findings of fact and conclusions of law in the opinion are to be given any effect, the appellant has protected itself against them by its exceptions and assignments. On the other hand, if the purported findings and conclusions, in the opinion, are to be treated as superseded by the findings of fact and conclusions of law subsequently signed and filed, then the appellant's exceptions and assignments to the statements

in the opinion, may be disregarded as superfluous because exceptions were taken and assignments made in respect of the same matters which were repeated in the written findings of fact and conclusions of law.

The trial court, however, signed the findings *as proposed by the Government,* apart from slight and unsubstantial changes. It is *these* "findings" (proposed by the Government and adopted by the trial court, almost without change) that the Government claims are *conclusive* upon this Court. The first question then is, what weight is to be given to such "findings", laying to one side the fact that this is an appeal in equity and, therefore, governed by the considerations which we have discussed above. Appellate courts hold that findings prepared by the appellee and merely adopted by the Court (particularly where, as here, they constitute findings of ultimate facts), do not carry the weight ordinarily attached to findings of a trial court. See *Brown v. United States,* 95 F. (2d) 487, 490 (C. C. A. 3, 1938).

In *Process Engineers, Inc. v. Container Corporation of America,* 70 Fed. (2d) 487 (C. C. A. 7, 1934) (Certiorari denied, 293 U. S. 588), the findings of the trial court, which had been prepared *in toto* by the prevailing party, were rejected on appeal where the Court made its own independent examination of the facts. The Court, in rejecting the trial court's findings (p. 489), said:

> "Such so-called findings do not help an appellate court. They reflect the views of counsel who submitted them and detract from the force and effect which are ordinarily given to findings made by the trial judge. When the abuse is aggravated (and the objectionable practice is growing), the assistance to

> the appellate court, which findings when carefully made by the trial court afford, is lost, and it becomes necessary for us to study the evidence as though no findings had been made by the District Court."

In the light of the principles enunciated in the cases just cited and of the circumstances under which the "Findings of Fact and Conclusions of Law" herein were formulated and signed, we submit that this Court should interpret the contract in issue without giving undue weight to the interpretation of the District Court, or to its so-called "findings" respecting the nature of the contract.

Reply to the Government's interpretation of the contract.

We sufficiently set forth the City's position with respect to the application of the trial judge's criteria to the contract in question in appellant's opening brief. (pp. 29-51.) We reply here to such contentions made by the Government as have not already been answered therein and will distinguish the more important cases summarized in the Government's argument on its construction of the contract. (Appellee's Brf. p. 24 et seq.)

Government's authorities on sale versus agency not in point.

The Government has cited in its brief (pp. 23-27) a number of cases holding that the language of agency in an agreement does not, necessarily, constitute an *agency* contract if the obvious intent of the parties was to make a *sales* agreement. These cases, almost without exception, have arisen in bankruptcy matters where creditors were

seeking to attach or had already seized goods in the hands of a retailer, and a wholesaler or manufacturer was claiming a lien on the goods, or asserting that the proceeds of their sale was a trust fund for his benefit.

In such cases, the rights of others than parties to the agreement are involved, and the Courts are critical (as they should be) to make sure that such rights are protected. They even strain a point to protect the rights of the strangers to the contract, and, that, independent of the element of estoppel which is usually present. Here, however, the situation is entirely different. The rights of *no* third person are involved in this case, or affected by the contract under review. Both parties to the contract intended it to be one of *agency,* and so expressed their intent in the contract, itself. They still believe and are asserting that it is a contract of agency. *No creditor of either party is claiming otherwise.* Only the Government, *whose rights cannot be affected by any construction that may be put upon the contract,* is asserting that it is different from what it purports, upon its face, to be, and what the parties to it are still asserting that it is. We repeat, the circumstances of the present case are essentially different from the circumstances in the cases upon which the Government relies, in all of which, persons, other than the parties to the contract, were claiming a lien upon or rights in the proceeds of goods which were the subject matter of the contract under review.

Standard Co. v. Magrane Houston Co., 258 U. S. 346, 66 L. ed. 653 (1922) (Appellee's Brief p. 24), was a case of the latter type. It involved an exclusive agency agreement for standard dress patterns which was claimed to be void

as a violation of the Clayton Act. The petitioner claimed it was a joint venture or agency. The Supreme Court held (p. 354) that inasmuch as the agreement called for outright purchase, transfer of title, and dominion to the buyer, the term "agency" as applied to the agreement was a misnomer. In short, the agent was merely the sole local store at which the petitioner's goods could be bought by the public. In that case, the agent was allowed to sell dress patterns, which were delivered to it, *at any figure it desired in excess of minimum prices which it was required to pay to the seller,* and was forbidden to handle any competing patterns. The seller made no attempt, in its contract, to prescribe either the amount or the means by which the selling price was to be determined.

In *Coweta Fertilizer Co. v. Brown,* 163 Fed. 162, 165 (C. C. A. 6, 1908) it was conceded by counsel for both parties, that the contract was one of sale, not agency. The sole contention made by the petitioner was for a conditional sale lien on property which it had sold and delivered to the bankrupt. The attempt on the part of a seller to retain title to merchandise, sold to a retailer, as against creditors of the latter, by means of a conditional sales contract, was expressly made illegal under the laws of Tennessee (where the litigation arose). The retailer had no right to return unsold goods, and assumed all risk of loss.

In *In re Rabenau,* 118 Fed. 471 (D. C. W. D. Md., 1902), a similar situation existed; the consignee assumed all losses, and took delivery of goods f.o.b. factory; he was required to account to the seller for certain minimum prices, *and could sell at any price in excess of those and retain the entire proceeds.*

In *In re Linforth,* 15 Fed. Cas. No. 8369, page 558 (C. C. Cal. 1877), a similar situation was present. The Court said, "It is a consignment of goods *to be paid for at a price agreed upon,* and which bore *no relation* to the prices at which consignees made sale, or the amounts they might be able to collect". The Court held (and properly) that the transaction was a sale, and not a *true* "consignment".

In *Chickering v. Bastress,* 130 Ill. 206, 22 N. E. 542 (cited several times in appellee's brief), an identical holding was made in reference to sale of pianos on "consignment". An attempted reservation of title in the consignors was held void *as to creditors of the consignee.* The same situation is true of all the remaining cases cited on pages 25 and 26 of appellee's brief.*

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*Other cases are cited by the Government in the footnote to its brief, page 60. Typical of them are:

Standard Co. v. Magrane-Houston Co., 258 U. S. 346, already discussed, pages 14-15, *supra.*

Howard v. Hancock Oil Co., 68 F. (2d) 694 (C. C. A. 9, 1934).

This was an oil sale contract where parties designated in the contract as *buyer* and *seller* agreed therein to buy and sell certain oil. It was held in a bankruptcy suit that the seller could not convert this contract into an agency by claiming that it was retaining title as security until after the oil was gauged. The Court emphasized the effect of the use of the proper *words* for a sales contract as lending weight to its equitable conclusion that it should be held a sales contract as against creditors of the purchaser.

The decision in principle is authority for a like emphasis to be placed upon the words of *agency* used in the contract at bar in determining its characteristics.

Donlan v. Turner, Dennis & Lowry Lumber Co., 282 Fed. 421 (C. C. A. 9, 1922).

Here again was a contract entitled "Contract of sale", the parties to which were called vendor and vendee. They agreed to sell and buy. Notes were taken in payment. The Court said, at page 424, "but we are constrained by the definite language used by the parties", and held the contract to be one of sale.

This case also is authority for the City's contention that the definite language of agency used in the contract at bar should add great weight to its construction as an agency contract.

In re Leflys, 229 Fed. 695 (C. C. A. 7, 1916).

This case is almost identical in fact with the *Standard-Magrane-Houston* case above noted. No price was fixed except the minimum price.

The same criticism applies to all the remaining cases cited on page 60 of appellee's brief.

We are unable to see what bearing any of the above mentioned cases has on the situation at bar. The City does not convey *title* to its electric energy to the power company, and it transfers possession only for the fraction of a second necessary to transmit the energy from Newark to the consumer's meter. The energy is sold the instant that the consumer turns his switch and receives it. Delivery and sale are accomplished at the same instant and by the act of the consumer.

The manner in which the price of the electric energy is fixed in the contract of July 1, 1925 is no evidence of a sale to the Company.

In view of the fact that the City's energy must be commingled with the millions of kilowatts of energy furnished by the power company from its own sources, which are necessary to supply the *total* demand of consumers, the City was compelled, out of practical considerations, to provide in the contract that the prices at which the energy should be sold should "not exceed the *lawfully established* rates" (Rec. p. 81) (i. e., those fixed by the Railroad Commission of California), so that the City might receive the same price for its energy as the power company would receive for its own energy which it supplied to the identical consumers. This arrangement was satisfactory to the City, *as seller of the energy to the cosnumer.* It was not a delegation to the power company of control of the selling price. The contract (and not the power company) fixes the price and requires that accounting shall be based on the price so fixed.

The contract basis of accounting is not a sale price.

Much criticism is attached by the Government to the fact that the price received by the City is a percentage of the *weighted average price* per kilowatt hour which the company collects from consumers rather than a percentage of the price collected on *each individual sale.* And the Government makes this criticism despite the fact, as we have pointed out, that the kilowatts could not, under any conceivable circumstances, be segregated. The Government has not proved for instance, except to the extent of $25,000 over twelve years of operation (i. e., less than one-tenth of one per cent of the City's total return), that the price which the City receives is not the true percentage of the weighted average price actually collected by the power company.

The contract required that it should fluctuate with changes in rates. The Government says (Brief p. 41) that this provision of the contract is ambiguous. However, the parties to the contract have had no difficulty in interpreting it. It is clearly susceptible of the interpretation which the parties have given it. Moreover, the Government is not injured in any way, by their interpretation. In the circumstances, we submit that the Government's criticism of the contract in this matter is without merit, and does not even tend to show that the parties' interpretation of the disputed provision is incorrect.

That the provision of the contract which requires the sale price of the electric energy to be fixed in conformity with the laws of California (i. e., by the Railroad Commission), is, in practical effect, a *fixing of price by the*

City, as principal, is further established by the provisions of Sections 14-B, 15 and 63-B of the Public Utility Act of California. (General Laws of California, Volume 2, pp. 3130, 3131, 3174.) It will there be seen that all public utilities are required to file their rate schedules with the Railroad Commission, that the Commission has power to determine and prescribe the rates chargeable by these utilities, and that the rates so prescribed *shall not be changed except on order of the Commission, made and entered after a hearing.* The suggestion in appellee's brief (p. 52) that these rates are *maximum* rates is, thus, refuted by the language of the Public Utility Act. The legal authority of the City to agree to rates fixed by the Railroad Commission is contained in the California Statutes of 1915, page 1273, Section 1. (General Laws of California, Vol. 2, Act 6388, p. 3185.) It follows from this, that the City, in adopting the rates which should be fixed by the Railroad Commission, was acting, not only in accordance with the factual requirements of the situation, but in strict conformity with authority vested in it and in the Railroad Commission, by the laws of California.

While Paragraph *First* of the contract states that the charges to consumers "shall not *exceed* the lawfully established rates", it is evident that this provision (read in conjunction with the above cited sections of the Public Utilities Act, which were in effect at the date of the contract), requires that the rates fixed by the Railroad Commission shall govern. This construction is also borne out by the provision of Paragraph *Eighth,* which requires rates to *increase or decrease* proportionately to the then "*established* rates". "Established", by whom? By the

state's rate-fixing authority, which is the Railroad Commission.

It should be noted, further, that, in Section 9 (o) of the Raker Act, the Congress required that all charges made by the grantee for the sale of power for consumer purposes *must conform to the laws of the State of California.* The "laws of the State of California" vest rate fixing power in the Railroad Commission.

From the foregoing, it is clear (so we submit) that there is no merit in the appellee's argument that title to the energy, which is the subject matter of the contract of July 1, 1925, is vested in the Company, because the Railroad Commission's rates which govern in respect of the contract, apply also to Company-owned energy.

Undoubtedly, such adjustments should be made, in the Company's accounting to the City, as are consistent with changes in the average rate per kilowatt hour received by the Company in accordance with the rates fixed from time to time by the Railroad Commission. *The contract requires this, and both parties to it are willing that such correction in accounting should be made.* The fact that the contract's requirement in this regard has not been strictly followed by the parties, can not affect the validity of the contract, or furnish any ground for enjoining its continued operation and/or the disposition of energy under it. We submit that a court of equity should lend its powers to the preservation of an agreement which has been highly beneficial to the City as principal, apparently satisfactory to the Company as agent, and, so far as this record is concerned, has been without complaint from consumers of electric energy, rather than to

use such powers to destroy the agreement, through a strained construction of its provisions, designed to bring them in conflict with Section 6 of the Raker Act.

The attempt to base the decision of this case on authorities involving contracts for the sale of tangible personal property necessarily fails in logic, because of the difference in the character of the goods and the methods by which it is physically possible to handle them, and because, as well, each case rests upon its own facts. In one set of cases, the delivery to and acceptance by the consignee, under one of many possible optional arrangements, may indicate an intention to make a *sales* contract, notwithstanding attempts to cloak this intention. Under another set of circumstances, the physical facts attendant upon the transaction may show that the parties intended to do precisely what their agreement states to be their intention, i. e., to make an *agency* contract, and may entirely remove any suggestion of an intent to make a *sales* contract under the guise of an *agency* contract. In every case, the question is what was the *real* "intent" of the parties?

Energy losses fall on the City, not the Company.

The Government throughout its brief (see particularly, pp. 38-39) contends that the contract in question is a contract for the *sale* of *76* per cent of the City's energy for a fixed price of 26.935 per cent of 2.383 cents per kilowatt. This contention is not borne out by the facts of the case, or by the language of the contract. In a case such as the present, where the Company is selling energy to consum-

ers, *for the City's account,* and supplementing that energy with an amount, generated in its own plants, sufficient to meet consumer demands, it must be apparent that the loss of energy necessarily incurred in transmitting, stepping-down, distributing and metering the same cannot be ascertained by merely summing up the readings of the consumers' meters and subtracting the reading at the City's meter at Newark. It was possible, however, for competent engineers to ascertain, with reasonable exactness, just what energy loss occurs in transmitting energy from Newark to San Francisco consumers, *in terms of percentage of any given quantity so transmitted.* This percentage would cover an element of *average* loss, resulting from conductor resistance, transformer losses and meter inaccuracies. It necessarily varies with fluctuations in the volume of energy transmitted, but taken over a period of time it is susceptible of accurate measurement. *Prior to the execution of the contract of July 1, 1925, this loss had actually been measured by the Company and found to be 24 per cent.* To this fact is due the requirement in the contract for the deduction of 24 per cent of the amount of energy delivered *at Newark,* in computing the amount of energy delivered *at San Francisco* which is the basis of return under the contract. This figure was stated to be in conformity with actual experience, according to the witness Ellis. (Rec., pp. 432-434.) These facts made at least a *prima facie* showing that the City, (as owner of the energy) agreed to a deduction of *actual losses only,* in the Company's accounting, and that it fixed the amount of such *actual* losses in the only practicable

manner (i.e., *by actual experience);* moreover, the Government made no attempt whatever to overcome the City's showing with respect to the losses. There was no showing, for example, that the conditions of delivery subsequent to 1925, when the contract was made, were any different from those that obtained at that time. Such being the case, the Court could have no basis for assuming that the 24 per cent deduction does not represent the *actual* average loss of energy between Newark and San Francisco, which is properly deductible in any accounting by the Company as agent of the City. The ascertainment of such losses by estimate based upon investigation (as in this case) was upheld as proper in *Utah Power and Light Co. v. Pfost,* 286 U. S. 165, 190, 76 L. Ed. 1038, 1051 (cited at page 38 of Appellee's Brief). Thus, the facts and the law *refute* the contention of the Government that the figure of 24 per cent stated in the contract as the amount of transmission losses is an "arbitrary" figure.

In *Donlan v. Turner, Dennis & Lowry Lumber Co.,* 282 Fed. 421 (C. C. A. 9, 1922), (cited several times by Appellee) the Court said, with respect to the general rule that loss follows title (p. 424):

> "But the rule is not without exceptions, for not infrequently are valid agreements made where the property is in one and the risk in another".

From this it follows that the *possibility* that the Company *may,* also, sustain *some* loss (unproven and nonexisting as far as the evidence indicates) would be insufficient to indicate a sale to the Company, under the contract of July 1, 1925.

An agency agreement does not violate Section 6.

If the contract is one of agency it is not forbidden by Section 6 of the Raker Act. We have already pointed out that the attempt of the Government to strain the language of Section 6 by interpreting "selling or letting" to include any form of physical transfer, is not justified either by the evidence in the case or by any logical construction of the intent of Congress derivable from examination of the language of the Act, and the circumstances existing at the time it was passed. The Government insists that this prohibition, necessarily, forbids the right to sell *as agent,* since (so the Government says, Brief p. 27), "the agent must control the output of the City's plant and thus destroy competition". Again, the Government says (Brief p. 27), "Even if the contract be deemed one of agency, it was within the ambit of Section 6, since it granted to the Company, *for a consideration* the right *as agent* to sell the energy". (Italics ours.)

The Government's argument that the contract of July 1, 1925 should be held to be one of "sale" rather than "agency" because the Company has a "control" over the electric energy, lacks foundation either in fact or in law.

The first of the above quoted excerpts from page 27 of the Government's brief is absolutely a *non-sequitur,* and the cases cited to support it do not do so. *The agent does not control the output of the City's plant.* The City, *through its contract,* controls the acts of the agent, and

the consumer's demand for electricity determines the rate of demand for the City's product.

Even if the contract of July 1, 1925 purported to grant *control* over the energy to the agent (which it does not) this fact would not convert the contract into a *sales* contract.

In *"Restatement of Agency"*, Vol. 1, § 14, sub. (b), it is observed (p. 48) that a person may contract with an agent *"not to exercise control."* In fact, one of the chief distinctions between an *agent* and a *servant* is that the *agent*, ordinarily, enjoys *freedom from control*, in respect of the manner in which he carries out the business of his principal, whereas the *servant* is usually restricted in the manner of his operations. *In this connection, it should be observed that much of the confusion in the Government's argument results from applying to the relation of principal and agent the rules that apply to the relation of master and servant.* This is a fatal defect in the Government's argument.

It is well recognized that an agent authorized to effect sales on behalf of its principal may fix the *price, terms* and *conditions* of sale.

> 2 *Am. Jur.*, p. 98, "Agency", § 120;
>
> *Mechem on Agency*, § 854;
>
> *Mechem on Agency*, § 2503 (referring to factors);
>
> 2 *Cor. Jur. Secundum*, p. 1319, "Agency", § 114 (bb);
>
> 2 *Cor. Jur. Secundum*, p. 1321, "Agency", § 114 (ee).

It is, also, well recognized that the agent is frequently authorized to "select the purchaser" and fix the "time and place of delivery".

> *Mechem on Agency,* § 854;
> 2 *Cor. Jur. Secundum,* p. 1322, "Agency", § 114 (ff).

In 2 *Am. Jur.,* p. 98, "Agency", § 120, the author points out that an agent with general authority to effect sales is deemed to have ostensible authority "to fix the terms of sale, including the time, place, mode of delivery, and the price of the goods, and the time and mode of payment".

Many other illustrations might be adduced to point out the distinction between an *agent* and a *servant,* and, thus, to make apparent the underlying fallacy in the Government's argument as applied to the contract here in issue, but we believe that those already given are sufficient for the purpose.

It is *physically* possible, of course, for the Company's load dispatcher to throw out the Hetch Hetchy switch and stop delivery of the City's energy, just as it might be possible for any agent to give away or destroy his principal's goods, *but such action would have no effect upon the contract or the rights of the City under it.* The Company's load dispatcher cannot destroy the liability of the Company to account to the City, *in strict conformity with the terms of the contract,* which is all that the law requires.

The contract does not destroy municipal competition.

Competition, to the extent that the City is in a position to compete, is not destroyed, but, rather, is promoted by its agreement with the Company. Not only do the rate payers have the protection of the California Railroad Commission under the terms of the contract, but the City can terminate the contract on *one* day's notice. The Company is required by force of circumstances, resulting from this contract, to sidetrack its own power development and transmission *in order to give preference to the City's electric energy.* If this is not competition, then we do not correctly understand the word. If, indeed, there is any suppression of competition, under the contract, it is *by favoring the City's product,* as against the Company's product.

It will be physically possible for the City to *supplant* the Company, in the *distribution* of electric energy, if and when it is financially able to and does construct its own distribution system, with the approval of its electorate. But such *competitive* distribution is not required by either the words or the intent of the Raker Act. Moreover, that will be *no* competition, if the City should acquire *the Company's distribution system.* It is not claimed that the City made any representations that it would go into the power distribution business in San Francisco, with a municipally owned plant, at the time it obtained the grant from Congress. We may be sure that if the Government knew of any such representations, it would have introduced evidence respecting them. Counsel quotes

(Brief, p. 62) the report of the Public Lands Committee of the House of Representatives to show that the provisions of Section 6, acquiesced in by the City, were designed to prevent any monopoly or private corporation from obtaining control of the *water supply* of San Francisco. Counsel for the Government says that what was said about "water" is equally applicable to electric energy. We think it very significant that the words "electric energy" were *not included* in the Committee's report. *The clear inference is that the City made no representations with respect to electric energy.* As pointed out in our opening brief (p. 9) the court below excluded all testimony showing what was the intended use of the electric energy at the time the Raker Act was passed.

The cases cited by counsel for the Government (Brief, p. 27), in support of its strained construction of Section 6 of the Raker Act, clearly bear no relation to the points sought to be made. *Speigle v. Meredith,* 22 Fed. Cas. No. 13,227, page 911, merely holds that a sale of lands in consideration of bond coupons is a sale *for a consideration.* In *Borland v. Nevada Bank of San Francisco,* 99 Cal. 89, the question was whether the stock was *sold* to the bank, or taken by it *as collateral.* The Court held that there was no agreement at all with respect to the stock deposited with the bank. The relevancy of these authorities is not apparent to us.

Section 6 is not enforceable as a statutory provision.

The argument to the contrary has been adequately answered in our opening brief. (pp. 57-72.)

We refer, in passing, to those of the cases cited by the Government (Appellee's Brief, p. 27) which were not discussed in our opening brief.

Wisconsin Central Railroad Co. v. Forsythe, 159 U. S. 46, 40 L. ed. 71 (1895), involved the right of Congress to grant certain reserved lands. The case is authority for holding that the intent of Congress is to govern, but the Court states (p. 55):

> "* * * To ascertain that intent we must look to the condition of the country *when the Acts were passed,* as well as to the purpose declared on their face, and *read all parts of them together.* (Citing cases.)
>
> "In order to determine the intent of Congress we must look at the situation at the time the Act of 1864 was passed." (Emphasis supplied.)

This principle is exactly what we have endeavored to introduce into this case by proffered evidence as to the status of the City's Hetch Hetchy project and the intended use of the energy at the time the Raker Act was passed, as compared with the conditions existing at the time the contract in issue was made. All of this evidence was excluded by the Court below, and to this exclusion error has been assigned. (Assignment No. 24.)

We also call the attention of the Court to the intention of Congress as expressed in Section 11 of the Raker Act, where it is stated that "nothing herein contained shall be construed as affecting *or intending to affect* or *in any way to interfere* with the laws of the State of California relating to the control, appropriation, *use* or distribution of water used in irrigation or for *municipal* or other uses

or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State''. The laws of California permit the City to use its water for generation of electricity for sale in the manner contemplated under this contract. The contentions of the Government with respect to Section 6 would nullify this legal right given to the City by California law, and amount to a contravention of the provisions of Section 11.

A grant for a valuable consideration should be liberally construed in favor of the grantee.

In view of the fact that the grant of rights and privileges made to the City by the Raker Act were compensated by the payments made and obligations assumed by the City, the value of which the City offered to prove was ten times the value of the rights and privileges granted to the City (Rec. p. 314, 321), the Raker Act should not be construed as one making a pure gift, but, on the contrary, should be liberally construed in favor of the City.

In *Burke v. Southern Pacific Company,* 234 U. S. 669, 58 L. Ed. 1527 (1914) dealing with a land grant the Court was at pains (p. 1544, col. 2) to point out that the grant was not merely a *gift* which ''should be construed and applied accordingly'', but that, on the contrary, it was a *grant upon consideration,* to be construed as such.

In the famous Charles River Bridge case, i. e., *The Charles River Bridge v. The Warren Bridge,* 11 Pet. 420, 9 L. Ed. 773 (1837), it is said (p. 828, col. 1, ft.):

> ''The general rule is that 'a grant of the King, at the suit of the grantee, is to be construed most beneficially

> for the King; and most strictly against the grantee;' but grants obtained as a matter of special favor of the King, *or on a consideration* are more liberally construed."

In *Washburn on Real Property,* 6th Ed. (Vol. 3), Section 2020, p. 173, the author, after stating the rule of strict construction which *ordinarily* applies to public grants, says that the rule applies in cases of uncertainty or ambiguity in the terms of the grant, but is inapplicable "where the grant is for a valuable consideration".

The City is not estopped to question the constitutionality of Section 6.

The Government states (Brief, p. 27) that the City has accepted the substantial rights conferred by the Act and is now estopped to question its constitutionality. We agree with this proposition so far as the statute as a whole is concerned. But the City is not attacking the constitutionality of the statute *as a whole.* The City's position is that if Section 6 shall be construed as the Government would construe it (i.e., as a statutory provision preventing the City from disposing as it sees fit of its own electric energy generated in it own power house, with its own water, and transmitted over its own distribution system) then *that section alone* (and *not* the entire Raker Act) is unconstitutional, because Congress is without power to regulate *purely local affairs.* The very authorities cited by the Government hold this.

In *Daniels v. Tearney,* 102 U. S. 415, 26 L. Ed. 187 (Government Brief, p. 72), the Supreme Court said (p. 419):

> "The cases are numerous in which it has been held that where a bond contains conditions, some of which are legal and some illegal, and they are *severable and separable* the former may be enforced and the latter disregarded".

In the *Tearney* case the Court held that the bond involved was *indivisible.*

The rule is different, however, where the provision attacked is clearly *separable* from the provisions by which benefits are conferred upon the attacking party. This distinction was recognized and applied in *Thompson v. Consolidated Gas Utilities Corp.,* 300 U. S. 55, 81 L. Ed. 510, the pertinent syllabus in which reads as follows:

> "A private party is not estopped to attack provisions of a statute that are harmful to his interests merely because he sought the enactment of other and separable provisions in it, beneficial to him in an incidental way, but neither relied on by him nor brought in question, in the litigation."

In the opinion, the Court, referring to benefits conferred by a statute, the acceptance of which by the plaintiff was claimed to preclude him from attacking the constitutionality of portions of the statute, said (p. 81):

> "Those benefits result incidentally from the enactment of other provisions of the Act, the constitutionality of which is not questioned, *and which seem clearly separable from the sections here challenged.*"

It certainly cannot be held that Section 6 of the Raker Act has any necessary relation to the rest of the grant and is *inseparable* therefrom. In fact, Section 6, if con-

strued in accordance with the Government's contention, would prevent the City from generating and selling the maximum amount of energy which can be developed on the project, as the City is required to do by Section 9(m) and (n) of the Act.

The cases cited by the Government to support its argument that the City, by accepting the benefits of the Raker Act, is estopped to question the constitutionality of a *separate* (and, as here, *collateral*) provision of the grant are clearly distinguishable as will appear from the brief review of them which we now make.

In *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17 (Appellee's Brief, p. 72), it was held that a railroad corporation which had applied for state incorporation and had accepted a charter requiring it to submit to statutory rates prescribed by the state legislature was estopped to claim that the rates prescribed were unconstitutional.

In *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, (Appellee's Brief, p. 72), a dissenting minority shareholder who had begun a *statutory* valuation proceeding to force purchase of his stock by a corporation about to sell its assets, was held, *by invoking the statute,* to have waived the right to challenge it validity.

In *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469 (Appellee's Brief, p. 72), the plaintiff, which had connected its property with a public sewer under permit from a sewer district, was held estopped to challenge the constitutionality of an order of the district, which levied a tax to defray the cost of the sewer.

In *North Dakota-Montana W. G. Association v. United States,* 66 Fed. (2d) 573 (Appellee's Brief, p. 72), the defendant had accepted loans under the Agricultural Marketing Act, and was held estopped to deny the constitutionality of certain provisions of the Act which limited the amount of set-offs against the Government's claims for repayment.

In *American Bond & Mortgage Co. v. United States,* 52 Fed. (2d) 318 (Appellee's Brief, p. 72), the holder of a permit for a radio station license, was held estopped to assert rights which he surrendered *voluntarily,* in order to get his permit.

In *Booth Fisheries v. Industrial Commission,* 271 U. S. 208 (Appellee's Brief, p. 72), an employer who had, voluntarily, accepted benefits under Wisconsin's Workmen's Compensation Act, was held to be precluded from challenging the constitutionality of the Act.

Fox River Co. v. Railroad Commission, 274 U. S. 651 (Appellee's Brief, p. 72), involved the validity of a recapture clause in a state dam permit.

Steward Machine Co. v. Davis, 301 U. S. 548 (Appellee's Brief, p. 73), holds that the Federal Social Security Act was valid in allowing employers in a given state, credit for unemployment taxes, paid to that state, only if the state law conformed to the Federal Act.

We repeat that the foregoing brief review of the cases cited by the Government to support its contention that the City cannot accept the benefits of the Raker grant and at the same time object to the constitutionality of Section 6, demonstrates that said cases are clearly dis-

tinguishable. In none of them was a party attacking a provision of a statute which was *separable* from other provisions upon which he relied, or which had conferred upon the attacking party benefits which he had accepted.

Moreover, we are not aware that the doctrine of estoppel to complain of the unconstitutionality of a statute has ever been applied to a state or to one of its political subdivisions, such as the City and County of San Francisco. The Government, or anyone else, dealing with a municipal corporation is put on notice of the limitations upon the powers of its officers, and the doctrine of ostensible agency has no application when those officers exceed their lawful power.

In this connection, see *Loan Association v. Topeka,* 87 U. S. (20 Wall.) 655, 22 L. Ed. 455, where it was held that the City of Topeka might attack the constitutionality of a bond issue created by the Legislature of Kansas, notwithstanding that the town authorities had received money for the bonds and had paid one installment of interest thereon. It was held that such payment worked no estoppel.

See, also:

> *Town of South Ottawa v. Perkins,* 94 U. S. (4 Otto) 260, 24 L. Ed. 154.

As pointed out in our opening brief (p. 86), the City of San Francisco had no authority, either under its charter or under the Constitution of California, to permit the Congress of the United States, or the Secretary of the Interior, to regulate the manner, price, or terms under which it should dispose of municipally owned electric

energy. Thus, there could not have been a valid acceptance of the provisions of Section 6, if that section means what the Government now says it means.

None of the cases cited by the Government is authority for the proposition (without the establishment of which the Government's argument on the question of estoppel must fail) that a legislative tribunal which acts wholly without the scope of its jurisdiction in respect of certain provisions of a legislative act (and that is the claim here made by the City) may, nevertheless, estop a beneficiary under said Act from attacking the constitutionality of *separable* provisions of the Act, which clearly lie outside its jurisdiction, merely because the attacking party has accepted benefits under portions of the Act which were clearly within the law-making power. In the cases cited by the Government,* the Sewer District had a clear right to levy a tax for sewer construction, and the State of Wisconsin had a clear right to enact a Workmen's Compensation Act, but the Congress of the United States had neither the right nor the power under the Federal Constitution, to regulate the City and County of San Francisco or prescribe the manner in which it should dispose of its own electric energy.

What has just been said brings this case within the principle enunciated in *Frost Trucking Co. v. Railroad Commission,* 271 U. S. 583 (Appellee's Brief, p. 77), in which the California Contract Truck Hauler Regulation Act was held to be invalid. The Court held that the State could not impose an *unconstitutional restriction* upon the

**St. Louis Co. v. Prendergast Co.* and *Booth Fisheries v. Industrial Commission, supra.*

use of property, *as a condition to doing a lawful business.* The restriction assailed was not one imposed in connection with the state's undoubted right to regulate the use of highways (a matter within its legislative power), but rather one imposed on the right to conduct a private trucking business, which, it was held, could not, constitutionally, be converted into a public utility without the consent of the operator, even though physically, and as a corporation, the operator was within the state's jurisdiction.

If the restriction had been one related to the use of public roads (such as the statute involved in *Stephenson v. Binford,* 287 U. S. 251 [cited by the Government at page 79 of its brief]), the restriction would, undoubtedly, have been held valid.

Similarly, the Federal Government may not extend its jurisdiction over the corporate business of San Francisco, *in matters wholly unrelated to the use of public lands,* merely because the water storage division of the City's project is within National park and forest reserves.

The restriction sought to be enforced upon the City is something not within the power of Congress to impose, and the City is not estopped from objecting to it. An entirely different question would be presented, if the assailed provision were one, clearly, within the congressional power.

There is another answer to the argument that the City is estopped to assert the unconstitutionality of Section 6 of the Raker Act, if its true meaning be that now claimed by the Government.

The conditions operating at the date of the enactment of the Raker Act and when the City accepted the benefits of the Act, are far different from those which later developed. As we pointed out in our opening brief (p. 9), the City attempted to show, but was prevented by the trial court from showing, that, at the time of the enactment of the Raker Act, the plans of the City were such that it was believed that there would be very little surplus electric energy for disposition under the terms of the Raker Act; as the result of conditions which developed later, this situation was changed. What might have been a non-burdensome restriction at the time of the enactment of the Raker Act has, by reason of subsequent circumstances, become utterly destructive of the City's investment. The acceptance of benefits under a statute in a given set of circumstances has been held not to create an estoppel later when the circumstances have greatly changed.

> *Abie State Bank v. Bryan,* 282 U. S. 765, 775, 75 L. Ed. 690, 703.

Furthermore, in so far as the provisions of Section 6 of the Raker Act may be said to be mandatory upon the City, the latter can not be said to have waived its rights to question the constitutionality of the provisions, by accepting the benefits of *other* provisions of the Act.

> *Obrecht-Lynch Corporation v. Clark,* 30 Fed. (2d) 144, 146, citing *Hawkins v. Bleakly,* 243 U. S. 210, and *Booth Fisheries v. Industrial Commission,* 271 U. S. 208, 70 L. Ed. 908, which latter case is one of the cases cited [Appellee's Brief p. 72]

by the Government in support of its argument that the City is estopped to deny the constitutionality of Section 6.

Section 6 of the Raker Act is not a provision for the protection of public lands and the cases cited to sustain the proposition that it is, do not do so.

The Government (Br. p. 77) makes the contention that Congress in disposing of the public domain may impose *any condition whatever* that it deems necessary for its protection against private exploitation. We shall not quarrel with this contention except to point out certain obvious limits to its application. Some of these limits are quite fully indicated in the case of *Ashwander v. Valley Authority,* 297 U. S. 288, upon which the Government greatly relies in its brief. (pp. 74, 76.) In reference to the power of Congress over public property of the United States, it was said in that case, at page 338:

> "* * * The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course, must be an appropriate means of disposition according to the nature of the property, it must be one adopted in the public interest as distinguished from private or personal ends, and we may assume that *it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States.* See Kansas v. Colorado, 206 U. S. 46. In this instance, the method of disposal embraces the sale of surplus energy by the Tennessee Valley Authority to the Alabama Power Company, the interchange of energy between the Authority and the Power Company, and

> the purchase by the Authority from the Power Company of certain transmission lines."

The Supreme Court pointed out, in the *Ashwander* case, that the *sale* of surplus energy generated on a public project to a privately owned power company was not a sale for "private or personal ends". In the *Ashwander* case, the power houses were on Government lands and the power was actually generated by Government authority. If (as held by the Court) it could dispose of this energy, in the manner suggested, without infringing the principle of disposing of *public* property for *public* benefits only, why should Section 6 of the Raker Act be held to require a *contrary* construction, considering that a reasonable interpretation of its language does not so require?

Continuing in the *Ashwander* case, the Supreme Court further said (p. 340):

> "* * * And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States. * * * the constitutional right of the Government to acquire or operate local or urban distribution systems is not involved. We express no opinion as to the validity of such an effort, * * *"

In other words, the only authority of the United States, which was upheld in the *Ashwander* case, was the authority to dispose *wholesale* of *its own* energy generated on *its own* lands. The Court, expressly, refused to go

further and say that the Government had a constitutional right to enter into the *local* distribution of electric energy. If the Government has no right, *itself,* to enter into *local* distribution, how can the *Ashwander* case be authority for the regulation of a municipality's right in the matter of its own local distribution?

Another case relied upon by the Government (Appellee's Brief p. 76) is *Camfield v. United States,* 167 U. S. 518. That case, as pointed out at page 114 of our opening brief, approved a decree requiring the removal and abatement of a fence *which enclosed public lands, although erected on adjacently owned private lands.* The only ruling was that Congress had a general authority over United States property analogous to the police power of the state, but was limited to the *physical protection* of the public lands. The contract at bar does not touch the public lands. With the exception of 3 per cent of the total amount of energy (generated at the Early Intake Power Plant), it does not involve electric energy generated *on public lands.* To hold that the Government may follow the energy generated by the City all the way to Newark and there dictate the manner of its disposal, would be equivalent to saying that it could regulate the use of water which originated on public lands but which flowed from them through private lands and into the sea. This intent, as we pointed out, is expressly disclaimed in Section 11 of the Raker Act. In the *Camfield* case, also, the Court expressly stated that the proprietor could enclose his own land, and that the Government had no right to prevent him from doing so since "he is entitled to the

complete and exclusive enjoyment of it, regardless of any detriment to his neighbor''. It was only because the fences erected were deliberately constructed with the idea of enclosing and shutting off the Government's lands, and not for any necessary protection of private lands, that they were held to be illegal.

United States v. Trinidad Coal Company, 137 U. S. 160 (cited at p. 76 of Appellee's Brief) was a suit to void patents to coal lands which had been fraudulently obtained by the defendant through the expedient of having its employees take up the maximum single entries and convey them to defendant. By this process, the defendant had obtained land in excess of that which could be lawfully acquired by one holder. Thus, the defendant's fraud related directly to the disposal of the land, itself, for which reason the case has no bearing on the issues at bar.

The case of *McKelvey v. United States,* 260 U. S. 353 (Appellee's Brief p. 77), involved an indictment against cattlemen for driving sheep men off public lands. The question was whether a statute of Congress punishing trespasses upon the public lands was unconstitutional. The Court said (p. 359):

> ''It is firmly settled that Congress may prescribe rules *respecting the use of the public lands.* It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned.''

There is no suggestion in the *McKelvey* case that the principle which it enunciated may be extended to the im-

position of *conditions upon the disposal of the sheep which grazed upon the public lands,* much less to the imposition of restrictions upon the disposition of *products generated,* far away from public lands, with the use of water stored on and transmitted over or through public lands.

In *United States v. Alford,* 274 U. S. 264 (cited at p. 77 of Appellee's Brief) an indictment was upheld against a person for building a forest fire which spread over a forest reservation. The Supreme Court held that the right to protect the public domain from fire depended upon the *nearness* of the fire, not on the *title* to the land where it was built. Here, again, the physical protection of *public* lands was involved, and not a theory for the public distribution of the indirect by-products of a partial use of public lands.

In *Stephenson v. Binford,* 287 U. S. 251 (Appellee's Brief pp. 72, 79), to which we have already referred (supra, p. 37), provisions of a Texas statute requiring private contract truck haulers to obtain permits to use the state highways and authorizing the Railroad Commission to prescribe the minimum rates which they might charge, were upheld as reasonable regulations for controlling highway traffic, and thus aiding the physical protection of the highways. This case might be in point, in the present case, if the City were here seeking to appropriate Government lands without Government authority, but no such issue is involved in the present case. Moreover, the regulation of highway traffic, which was

the matter involved in the Texas case, was strictly within the police power of Texas, whose statute was involved. The regulation of the strictly municipal affairs of San Francisco is wholly without the power of Congress, whose statute (i. e., the Raker Act) is involved in the present case.

CONCLUSION.

In conclusion, we submit, after a careful reading of the Government's brief, that neither the points made nor the authorities cited therein refute (or even make serious answer to) the contentions made in our Opening Brief. We, therefore, confidently submit, in line with what we have argued herein, and in our Opening Brief, that:

First. The contract in question is a valid *agency* contract, made in good faith by the City and the Company, to provide for the disposal of the electric energy, *which is required by the Raker Act to be generated and sold;*

Second. The manner in which the City is disposing of the electric energy is one permitted by the Raker Act and by the laws of the State of California, and was one which the City was forced to adopt because some period of time must, necessarily, elapse before the City would be financially able to acquire and operate its own distribution system;

Third. If any clause of the contract is not consistent with the declared intention and studied purpose of the parties to make it an *agency* contract, a court of equity

should have indicated the changes which, in its opinion, would make the contract a valid agency contract conformable to Section 6 of the Raker Act, instead of vitiating the entire contract, and inflicting upon the City the dire consequences which the decree herein engenders;

Fourth. If the actual conduct of the parties to the contract is not justified by its terms, or is not consistent with the agency purpose which underlies the contract, the City should be given an opportunity to reform its conduct under the contract so as to make it consistent with the agency principles to which it was designed to give effect;

Fifth. The Court should not impute to Congress a purpose, or give to Section 6 a meaning inconsistent with constitutional limitations upon the powers of Congress, at variance with the standing policy of the Federal Government, in the disposal of its lands adaptable to power generation; nor should the Court impute to Congress an intent which would do violence to the declaration of Congress in Section 11 of the Act itself; and

Sixth. Consistent with equitable principles and particularly those which deal with injunctive law, a decree ought not to be upheld which wreaks great damage upon the defendant, without working any corresponding or, in fact, any benefit whatsoever to the plaintiff.

If the facts and the law of this case be examined in the light of the principles which we have just enumerated, we believe that the Court will find many reasons and more than sufficient justification for reversing the decree of the Court below.

Dated, San Francisco,
April 7, 1939.

Respectfully submitted,

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